PRIVY COUNCIL REPORT

LEE KEE CHOONG v. EMPAT NOMBOR EKOR (N.S.) SDN. & ORS.

[Privy Council (Lord Kilbrandon, Lord Salmon and Lord Russell of Killowen) July 26, 1976]

[Privy Council Appeal No. 22 of 1975]

Companies — Winding up — Valuation of appellant's shares in company — Assessment by independent accountants — Application for order to reject report of accountants.

This was an appeal from the decision of the Federal Court reported at [1975] 1 M.L.J. 134. By a consent order it had been agreed that all the shares of the appellant and his brother be purchased by all or any of the respondents at a fair and just price to be assessed by a firm of accountants to be approved by the court. On the application of the appellant Messrs. Price Waterhouse were appointed to assess the shares and they did so. The appellants made an application that the valuation of Messrs. Price Waterhouse be rejected. The learned trial judge dismissed the application and an appeal to the Federal Court was dismissed. In addition to the grounds raised in the petition of appeal before the Federal Court, the appellants argued that as the report of the accountants was based only on the documentary matters they mention, that is the memorandum and articles of association and the audited and unaudited accounts, there was an error in principle which vitiated the valuation.

Held, dismissing the appeal: (1) no grounds had been shown for rejecting the valuation of the independent accountant;

(2) in the case of this Company there was no reason why a fair and just valuation could not be made on consideration only of the material specifically mentioned in the report and no expert evidence was led to suggest that it could not.

Semble: For present purposes it appears that the Civil Law Ordinance, 1956, section 3, adopted English law as administered at its effective date so that any subsequent march in English authority is not embodied.

Cases referred to:—

(1) *Dean* v. *Prince* [1954] Ch. 409.

(2) *Campbell* v. *Edwards* [1976] 1 W.L.R. 403.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

G. B. H. Dillon Q.C. (*V. K. Palasuntharan* and *Eugene Cotran* with him) for the appellants.

S. Bates Q.C. (*L. J. Morris Smith and S. Y. Chan* with him) for the respondents.

Lord Russell of Killowen (delivering the judgment of the Board): The appellant and his brother were minority shareholders in the first respondent company ("the company"), which carried on the business of running lotteries: the remaining respondents were the other shareholders, the second respondent company being the overall majority shareholder in the company.

The company was formed and started business in 1969. By 1973 the appellant and his brother had become dissatisfied with the way the company and its affairs were run, and on January 23, 1973 the appellant launched a petition in the High Court in Malaya at Kuala Lumpur for relief under section 181 of the Companies Act 1965 — which may be described as an "oppression" section — and alternatively for a winding up order. Their Lordships have not seen the petition, but infer from what was said in evidence that *(inter alia)* complaint was made in some respects of the reliability of the accounts of the company.

The petitioner and his brother and the other contributories decided however not to join battle on the complaints, and on July 5, 1973 a consent order was made that the respondents should buy the petitioner's shares and those of his brother in the company.

"at a fair and just price to be assessed by a firm of independent chartered accountants to be approved by the court."

On August 6, 1973 the petitioner applied by summons for the appointment of Price Waterhouse & Co. of Kuala Lumpur: the respondents put forward Peat, Marwick, Mitchell & Co. of Kuala Lumpur: in the event on September 10, 1973 the court acceded to the petitioner's summons and approved Price Waterhouse & Co.

"to determine the fair and just price of the shares of the petitioner [and his brother]"

and further ordered

"that the said Price Waterhouse & Co. be at liberty to have access to all bills, papers, vouchers, accounts and other documents of the company which they consider relevant for the purpose of carrying out the valuation of the shares of the petitioner [and his brother]."

The wording of the order exactly followed the relief sought by the appellant in his summons.

On December 1, 1973 Price Waterhouse & Co. reported in writing as follows:

"We refer to your letter of July 16, 1973 and the court order of September 10, 1973 in which we were appointed to determine a fair and just price of the shares held by [the appellant and his brother in the company].

2. For this purpose we have examined the following documents:

a) The memorandum and articles of association of [the company];

b) Photocopies of the audited accounts of [the company] for the following periods:

i) Period from January 29, 1969 (date of incorporation) to December 31, 1969

ii) Year ended December 31, 1970

iii) Year ended December 31, 1971

iv) Year ended December 31, 1972

c) Copy of the unaudited accounts of [the company] for the eight months ended August 31, 1973 submitted by the accountant of [the second respondent] Mr. Ch'ng Cheng Aun.

3. On the basis of this information we value the shares held by [the Appellant and his brother in the company] as follows:—

[The Appellant] — 1,375 shares at $184 per share = $253,000
[The brother] — 250 shares at $184 per share = $ 46,000."

The appellant and his brother considered this to be an undervaluation of their shares. The appellant on February 4, 1974 applied in Chambers:

"that the report of the Independent Chartered Accountants Price Waterhouse be rejected"

and for some other order to be made as to the valuation of the shares of the company. In support of that application the appellant in his affidavit said this:

"4. I am dissatisfied with the valuation for the following reasons —

(a) the said valuation is purported to be based on the audited accounts of the company the accuracy of which I challenged in the proceedings;

(b) the audited accounts do not show the receipt of the premium for the shares;

(c) the audited account under the column expenditure also includes the monies paid by the company to selling agents which should have been treated as part of the profits;

(d) the audited accounts do not show the unclaimed prize monies which should be included in the profits;

(e) the independent chartered accountants have refused to disclose the basis of their valuation and it appears that they valued the share on the basis of a winding up and not as a going concern which should be the proper basis;

(f) on the basis of a going concern the valuation should be no less than $600.00 for each share....

5. I crave to refer to the letter of M/s. Robert Lim, Kwong & Co., the Chartered Accountant advising my Solicitors annexed hereto and marked 'L K C2'.

6. In the circumstances I am advised and verily believe that the valuation of the shares by Price Waterhouse & Co., is wholly erroneous and misconceived and ought to be rejected.

7. In order to determine the fair and just price of the shares of the company the special audit of the company's accounts ought to be had and all improper expenditure and bonuses to directors and agents be taken as part of the profits. The premium paid on the shares and the unclaimed prize monies should also be taken to be part of the profits and the shares valued as a going concern."

Their Lordships record at this stage that the appellant's summons to reject the valuation was dismissed on March 4, 1974: the appellant's appeal from that order to the Federal Court of Malaysia was dismissed on October 1, 1974: and the matter reaches their Lordship's Board by reason of final leave given on March 17, 1975 by the Federal Court to the appellant to appeal from that dismissal to the Yang Dipertuan Agung.

To return to the evidence in support of the summons to reject the valuation: in the first place their Lordships must observe that no reliance whatsoever can be placed upon the mere assertion that the valuation should be no less than $600 per share. Further, no reliance whatsoever can be placed upon the valuation contained in the letter referred to in paragraph 5 of that affidavit: it is avowedly based upon information given to the accountants in question by the appellant and his brother, and no trace is to be found of what was that information. It is only fair to those accountants to say that their valuation was expressed to be subject to substantiation of the information (whatever it may have been) given to them by the appellant and his brother.

Their Lordships at this point remark that the affidavit in question was the only evidence in support of the summons to reject the valuation. On appeal to the Federal Court it was sought by the appellant to introduce further evidence: this attempt was rejected by the Federal Court, and though complaint of such rejection was made in the case for the appellant that complaint was not pursued in argument before their Lordships.

What then is left of the case as put forward in the appellant's affidavit?

Paragraph 4(a): This in their Lordships' opinion misconceives the function and effect of the settlement of the petition by the consent order: it cannot be in the province of the expert valuer in such case to adjudicate upon disputes as to the correctness of audited and adopted accounts.

Paragraph 4(b): This needs a little explaining. Apparently when the company was formed the appellant and his brother paid substantial sums to those concerned in the formation for the privilege of subscribing for shares at par. Counsel for the appellant agreed that paragraph 4(b) was misconceived, since he did not contend that these "premiums" should have been treated as received by the company. He sought however to suggest that their payment threw a light on the true value of the shares. In the first place their Lordships cannot see how the valuers under this order could be expected to make enquiries as to the existence of such special payments to get a foot in the door: and the appellant took no step to inform them. In the second place there is no reason to infer that knowledge of those payments would have made any difference: the record of the company's profitability was before the valuers in the form of the company's accounts from incorporation in January 1969 to August 31, 1973 and undue optimism as to future profits on the part of the appellant and his brother would not alter that. There is no analogy between this case and the relevance to value of recent dealings in shares.

Paragraph 4(c) of the affidavit: Their Lordships observe that this is a particular complaint of the audited accounts, which they have considered under their comments on paragraph 4(a).

Paragraph 4(d) of the affidavit: There is nothing in this, since it appears that under the relevant legislation unclaimed prize moneys are the perquisite of the State.

Paragraph 4(e) of the affidavit: Assuming that the valuation should have been on a going concern basis there is not a shred of evidence that it was not.

Paragraph 4(f) of the affidavit their Lordships have already rejected as of no evidential value.

Paragraph 7 of the affidavit adds nothing.

Before their Lordships however a different kind of point was taken, and certainly (though not surprisingly) more worthy of notice: it was based solely upon the form of the report of Price Waterhouse and the internal evidence of that report. It was said that they must be taken to have considered *only* the documentary matters which they mention, and to have based their valuation only on information gleaned from those documentary matters: that is to say the memorandum and articles and the audited and unaudited accounts that are mentioned. If that be so it was argued that they could not have addressed their minds to all the matters that could be relevant to a valuation of shares in the company, and there was therefore an error in principle vitiating the valuation. Their Lordships' attention was drawn to passages in *Dean* v. *Prince*[1] in support of the submission that to arrive at a fair and just value of shares in a company it can *never* as a matter of principle suffice to consider only the accounts of the company. Their Lordships are prepared to assume from the form of the report that the valuers did not travel outside the documents referred to: though they would imagine that in fact a locally situated firm of this calibre would be familiar

at least with the general background of lottery operations and would not have thought it necessary to mention background matters.

Nevertheless their Lordships are not persuaded by the argument which they have briefly rehearsed that in the case of *this* company a fair and just valuation could not be made on consideration only of the material specifically mentioned in the report, and they stress that no expert evidence was led to suggest that it could not.

Their Lordships do not need to comment on possible developments since 1956 in the law in England concerning ability to go behind a valuation on ground of mistake or error in principle, having regard to the emergence of an ability to sue such a valuer for negligence: see for example *Campbell* v. *Edwards*.[2] For present purposes it appears that the Civil Law Ordinance 1956, section 3, adopted English law as administered at its effective date, so that any subsequent march in English authority is not embodied.

Their Lordships would add this. The learned judge indicated that the mere fact that Price Waterhouse & Co. were nominees of the appellant would or might debar him from attacking their valuation. Since the Federal Court made no comment on this proposition their Lordships think it right to say that they do not agree with it.

Their Lordships are accordingly of opinion that the appeal should be dismissed with costs and will advise the Yang Dipertuan Agung accordingly.

Appeal dismissed.

Solicitors: *Wilson Freeman; Charles Russell & Co.*

A SINGAPORE REPORTS

TAY CHOO WAH v. PUBLIC PROSECUTOR

[A.Cr.J. (Chua J.) June 29, 1976]

[Singapore — Magistrate's Appeal No. 45 of 1975]

Criminal Law and Procedure — Criminal breach of trust by agent — Whether director an agent of the company — Dishonestly disposing of shares of company — Sentence — Penal Code, s. 409.

In this case appellant appealed against his conviction and sentence on a charge under section 409 of the Penal Code. It was alleged that the appellant being entrusted in his capacity as director of a company with 3,000 shares held by that company in another company, had dishonestly disposed of those shares. The appellant had sold the shares at par to Dr. Goh Kim Hua, a nephew of the appellant, and Dr. Goh's wife and mother.

Held: (1) in this case there was ample evidence to show that the appellant was entrusted with the shares in the way of his business as an agent. The appellant was at all material times a director and an agent of the company and he had received the shares and had arranged for their disposal in his capacity as agent;

(2) on the evidence in this case the learned District Judge was right in coming to the decision that the appellant had dishonestly disposed of the shares;

(3) that the sentence in this case was not manifestly excessive.

Cases referred to:—

(1) *Cooray* v. *The Queen* [1953] A.C. 407.

(2) *Reg.* v. *Portugal* (1885) 16 Q.B.D. 487.

(3) *R.K. Dalmia* v. *The Delhi Administration* A.I.R. 1962 S.C. 1821.

(4) *Ferguson* v. *Wilson* (1866) 2 Ch. App. 77, at p. 89.

(5) *Great Eastern Railway Co.* v. *Turner* (1872) 8 Ch. App. 149 at p. 52.

(6) *Teh Lee Ting* v. *Rex* [1956] M.L.J. 194.

(7) *Khoon Chye Hin* v. *Public Prosecutor* [1961] M.L.J. 105.

MAGISTRATE'S APPEAL.

Francis T. Seow for the appellant.

M. D. Sherrard Q.C. (*Allen Yau* with him) for the respondent.

Chua J.: The appellant, Tay Choo Wah, was found guilty by the District Court and convicted on three charges of criminal breach of trust as an agent under section 409 of the Penal Code and was sentenced to eighteen months imprisonment on each charge, the sentences to run concurrently. The case of the prosecution was that the appellant being entrusted in his capacity as Director of Sin Chew Realty Pte. Ltd. with 3,000 shares held by Sin Chew Realty Pte. Ltd. (to which I will hereinafter refer to as "Sin Chew") in Modern Housing Development Pte. Ltd. (to which I will hereinafter refer to as "Modern Housing") dishonestly disposed of those shares.

The appellant was charged with these charges jointly with his father Tay Ah Choon. The trial judge at the commencement of the trial found that Tay Ah Choon was of unsound mind and incapable of making his defence and Tay Ah Choon was released to the care of his wife under the provisions of section 300 of the Criminal Procedure Code and thereafter the trial proceeded against the appellant alone.